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Petitioners,

v.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government does not contest that this case affects the rights of thousands of poor children to crucially needed disability benefits; that the absence of a circuit conflict results from the dearth of lawyers for poor children, not any lack of importance as to the question presented; or that the decisions below reflect a peculiar intra-circuit (actually, intra-litigation) conflict, in which the first panel (ignored by the second) found that the policy challenged here would be patently illegal. Instead, the government focuses principally on the merits, seeking to fit the square peg of a facial statutory violation into the round hole of discretionary agency rulemaking.

In the process, the government largely ignores the decades-long struggle between Congress and SSA over the agency's grudging implementation of the combination principle embodied in 42 U.S.C. § 1382c(a)(3)(G) – a struggle that has required periodic judicial intervention to keep the agency on track. See, *e.g.*, *Sullivan v. Zebley*, 493 U.S. 521 (1990); *Dixon v. Shalala*, 54 F.3d 1019 (2d Cir. 1995). This is another such occasion: the policy challenged here violates the plain language of the statute, as interpreted in *Zebley*, because it mandates that even very serious physical and mental impairments be assigned *no* weight in the final determination of disability if they do not contribute to a marked limitation in a particular domain.

The government further seeks to blur this facial statutory challenge with the alternative, fact-based ground for invalidating the challenged policy: that it

ignores good medical practice and leads to irrational real-world results. The government's challenge to the factual sufficiency of this point is simply wrong: the record is ample, one-sided, and confirmed by an impressive array of *amici curiae* (including leading national organizations of mental health professionals, and both national and local advocates for the rights of disabled children) whose presence at the petition stage signals the importance of this case to a vulnerable and underrepresented population.

I. The Government Ignores and Mischaracterizes the Ongoing Struggle Between Congress and SSA Crystallized in the Facially Illegal Policy Challenged Here

Review is warranted here because the challenged policy not only violates § 1382c(a)(3)(G) as interpreted in *Zebley*, but also exemplifies the pattern of chronic agency defiance of Congress and the courts described in the Petition (at 4-8) but ignored by the government's Brief in Opposition ("Opp.").

Congress has consistently commanded that SSA, in both child and adult cases, "consider the combined effect of *all* of the individual's impairments" and that "the combined impact of the impairments shall be considered *throughout* the disability determination process." 42 U.S.C. § 1382c(a)(3)(G) (emphasis added). That explicit command is mirrored in SSA's implementing regulations. See 20 C.F.R. § 416.923. Congress has never changed or softened this language, but to the contrary emphasized its importance even as it was amending the statute in 1996 to require a higher level of disability in children's cases. The Conferees stressed that, in implementing the

new standard, SSA must heed *Zebley*'s determination that the agency had previously been "remiss" in failing to "ensure that the combined effects of all the [child's] physical or mental impairments are taken into account" in making the disability determination. H.R. Conf. Rep. 104-725, at 328, reprinted in 1996 U.S.C.C.A.N. 2649, 2716. See Pet. 8.

Against these clear statements, the government argues that the 1996 legislation was intended to weaken or obviate the long-honored combination principle – and authorize the agency to adopt an unpublished policy failing to assign weight to all impairments – based solely on Congress's unexplained direction to eliminate the Individual Functional Assessment ("IFA") previously embodied in step four of the children's claim process. Opp. 14. But the agency itself recognized in 1997 that elimination of the IFA could not be read as an instruction to cease either functional assessment or consideration of combined effects. In his commentary to the 1997 regulations, the Commissioner characterized elimination of the IFA merely as a procedural change tied to the heightened standard for disability: "We have removed the reference to the prior IFA step and made minor revisions *to reflect the new statutory standard and the new sequence of evaluation*." 62 Fed. Reg. 6408, 6411 (1997) (emphasis added). The Commissioner further noted:

> [E]ven though it eliminated the IFA, Congress directed us to continue to evaluate a child's functional limitations where appropriate, albeit using a higher level of severity than under

> the former IFA. Congress also explicitly endorsed our functional equivalence policy as a means for evaluating impairments that would not meet or medically equal any of our listings and without which some needy children with severe disabilities would not be eligible.

Id. at 6413.

As demonstrated in the Petition (at 9-11, 18-19), the policy challenged here plainly violates the statutory command (as well as its implementing regulations), because it requires that only *certain* impairments be given any ultimate weight in the determination of disability – namely, those that either cause or contribute to a marked limitation in a particular domain. Those that do not (including, potentially, a borderline retarded IQ of 71) are assigned *no* ultimate weight. Indeed, it is undisputed that, if faced with a claimant suffering from a marked (and almost extreme) limitation in one domain, and nearly marked limitations in *every other domain*, an ALJ would lack any discretion to determine that the claimant's overall functional limitation meets the statutory standard of "marked and severe." The government fails to explain how such a policy could conceivably satisfy the command that "the combined impact of the impairments shall be considered throughout the disability determination process."

Nor can the government explain why *Zebley* does not control here. While *Zebley* addressed a prior methodology for assessing children, it was applying precisely the same statutory direction to consider the combined effects of all impairments. As the government acknowledges, *Zebley* is not satisfied

simply because SSA provides *some* individualized functional assessment of children – it complies with the statute only "so long as 'children are given the *same* level of individualized consideration as adults.'" Opp. 12 (quoting decision below, Pet. App. 17a n.3, in turn citing *Zebley*, 493 U.S. at 535 n.16) (emphasis added). The statute and regulations promise children a functional assessment roughly equivalent to that provided by the five-step adult process. However, in adult cases, ALJs may give weight to *all* impairments in reaching an overall judgment as to whether a claimant meets or equals a listing. See 20 C.F.R. § 404.1523; 20 C.F.R. § 416.923. In contrast, under the unpublished policy enforced in children's cases, impairments that do not contribute to a marked limitation are *dropped* from consideration and given no ultimate weight. Children simply do *not* receive "the same level of individualized consideration as adults."

The government further argues that *Zebley* should be read narrowly because the regulations then at issue required claimants to demonstrate functional equivalence to a specific listed impairment, citing a footnote focusing on a child with Down's Syndrome who would have to meet another specific listing. Opp. 13 n.3 (citing *Zebley*, 493 U.S. at 532 n.10). The government avoids discussing the *next* footnote in *Zebley*, the one actually cited in the Petition:

> For example, if a child has both a growth impairment slightly less severe than required by listing § 100.03, and is mentally retarded but has an IQ just above the cut-off level set

> by § 112.04, he cannot qualify for benefits under the "equivalence" analysis – no matter how devastating the combined impact of mental retardation and impaired physical growth.

Id. at 532 n.11.

While child claimants now need not meet all of the requirements of a particular listing to establish functional equivalence, under the challenged policy a child with the same impairments as in the Footnote 11 example could confront a similar artificial barrier to the holistic assessment that Congress requires. If, after the combined effects of all impairments were considered *within* each domain, the ALJ determined that the child's growth impairment contributed to only a moderate limitation in the domain of "health and physical well-being" and that her mental retardation caused only a moderate limitation in the domain of "acquiring and using information," the ALJ would have no discretion to find the claimant qualified for benefits "no matter how devastating the combined impact of mental retardation and impaired physical growth." *Ibid.* Indeed, the ALJ would lack such discretion even if he found a *marked and nearly extreme* limitation in one domain and a *nearly marked* limitation in the other. The challenged policy thus violates 42 U.S.C. § 1382c(a)(3) in a way quite similar to the scheme struck down in *Zebley*.

The government ultimately retreats to a purely circular argument: that, since the Commissioner chooses to define a three-step process that concludes with the scoring of domains, the consideration of combined impact only *within* each domain must, by definition, satisfy the statutory mandate to consider

combined impact "throughout" the process. Opp. 13-14. But simply calling step three the last step does not mean that *all* impairments have been given due weight. Judge Katzmann, writing for the first court of appeals panel in this litigation, had no trouble puncturing this conclusory argument:

> [W]e cannot accept an interpretation of "consider the combined effect" where the impairment is assigned zero weight in the ultimate decision whether or not to award benefits. Nor can this approach be reconciled with the statutory requirement that the Commissioner consider "the combined impact of [all of the claimant's] impairments *throughout* the disability determination process." 42 U.S.C. § 1382c(a)(3)(G).

Pet. App. 79a.

Nor is anything added by citing the second panel's quotation of the Commissioner's unsubstantiated assertion that permitting adjustments to give weight to all impairments would be "too close" to the discontinued IFA process. Opp. 14 (quoting Pet. App. 18a). As noted above, Congress did not explain *why* it wanted the IFA discontinued, and any suggestion that the reason was to limit the ability to consider the combined effects of *all* impairments is belied by the legislative history's specific, contemporaneous admonition to the contrary and the unchanged relevant statutory text.

The government's suggestion that petitioners have failed to propose a workable method to implement the required discretion is beside the

point, because it is the Commissioner's burden to craft procedures that satisfy the statutory command of 42 U.S.C. § 1382c(a)(3)(G). The objection is also disingenuous; the Commissioner knows full well how to provide ALJs with guided discretion to take account of all evidence, as he does in adult cases. Under the domain regime, the Commissioner could provide that two moderate limitations may be treated as one marked limitation, as was permitted under the prior regulations.[1] See also Pet. App. 77a (alternative suggestion by first panel).[2]

Finally, the government's argument (Opp. 16-17 & n.6) for deference under under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984), fails for two reasons. First, "'interpretations contained in policy statements, agency manuals, and enforcement guidelines' . . . . are beyond the *Chevron* pale." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).[3] Second,

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[1] Again, there is no basis for the suggestion (Opp. 16 n.5) that elimination of the IFA indicated disapproval of this type of flexibility. The other pre-1996 functional equivalence regulation the government cites, 20 C.F.R. 416.926a, did not impose a rigid two marked limitation standard, but rather permitted claimants to demonstrate equivalence to *any* listing, including many that required less than two marked limitations.

[2] *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 401 (2008), is not relevant here. That case rejected a suggested construction of "charge" under the ADEA that ran directly contrary to Congressional intent.

[3] Deference was extended in *Barnhart v. Walton*, 535 U.S. 212, 219-220 (2002), because the policy at issue there was reflected in a 1982 SSR and published materials dating back to 1957.

even if *Chevron* nominally applies, Congress has expressed its clear intent that SSA consider the combined effect of all impairments throughout the disability determination process. Where Congress has spoken, no deference is due to contrary agency actions. See *Chevron*, 467 U.S. at 838.

II. The Factual Irrationality of the Challenged Policy Is Established by Uncontradicted Evidence and Separately Supports Reversal

The decision below also rejected a separate ground for invalidating the challenged policy: that it produces irrational *results* as a matter of fact. The government appears to conflate this separate claim with the facial challenge discussed above, but contrary to its assertion (Opp. 14), the policy's irrationality is established by compelling, uncontradicted evidence.

The *only* evidence in the record is a detailed declaration submitted by a nationally respected school psychologist, Kevin Dwyer, explaining why the challenged policy violates established standards of childhood assessment and inevitably leads to irrational results, particularly in view of the high incidence of co-morbidity between certain common childhood impairments. See Pet. 14, 21; C.A. App.

Here, in contrast, the challenged policy is unpublished and *conflicts* with the published regulations – and is so ephemeral that the first panel below did not even perceive that it existed. *See* Pet. App. 75a (noting that SSA's 1997 comments "suggest strongly that the new regulations preserve the flexibility it enjoyed prior to the Welfare Reform Act").

1902-1903.[4] Remarkably, while purporting to apply the limited deference accorded to informal agency action under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the court of appeals upheld summary judgment *against* petitioners even though the Commissioner neither submitted *any* contrary evidence nor even claimed to have received any expert advice in the rulemaking process on the rationality of the challenged policy.

In any event, as demonstrated in the Petition (at 10-11, 20-21), the facts of the individual petitioners' cases amply demonstrate the irrational impact of the challenged policy – and these facts are record evidence, not new "examples" offered only at the "certiorari stage," as the government suggests. Opp. 15. Nor is there anything wrong with *amici curiae* supplying additional compelling examples of the policy's real world application. See Brief of Empire Justice Center, Disability Rights California, Youth Law Center and Disability Law Center As *Amici Curiae* in Support of Petitioners ("Disability Advocates' Brief"), at 14-18. This Court frequently relies on factual input from experts regarding the impact of challenged policies. See Pet. 19 n.5 (describing *Zebley*'s reliance on *amicus* submissions); see also *Maryland v. Craig*, 497 U.S. 836, 855, 857 (1990) (citing facts raised in brief of American Psychological Association regarding traumatic effect of face-to-face confrontation on child victims).

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[4] Mr. Dwyer's powerful and authoritative presentation may be read in its entirety at C.A. App. 1891-1904.

Literally *nothing* in the record supports the government's assertion that the challenged policy is consistent with "good medical practice." Opp. 16. The government claims only that the agency consulted medical experts generally with respect to the new regulations in 2000 (though apparently not in 1997, when the challenged policy was adopted) (Opp. 16), but SSA has *never* claimed that *any* expert *ever* endorsed the specific policy challenged here. There is thus no evidence that the agency actually *employed* the expertise at its disposal in formulating the challenged policy.

Mr. Dwyer's uncontradicted conclusions are supported by several mainstream national organizations with relevant expertise. See Brief of *Amici Curiae* Children's Defense Fund, National Alliance on Mental Illness, Mental Health America, National Association of School Psychologists, and National Association of Social Workers in Support of Petitioners, at 6 (challenged policy "is guaranteed to exclude and neglect very serious limitations, is inherently irrational, and is inconsistent with modern methods of treatment and analysis").

The government answers this uncontradicted showing with the truism that any rule requiring line-drawing may lead to imperfect results. Opp. 15. But this maxim has limits. As Justice O'Connor observed in her pivotal concurring opinion in *Bowen v. Yuckert*, 482 U.S. 137 (1987), a procedural step (like the artificial bifurcation of functional equivalence analysis required by the challenged policy) cannot be used as a mechanism to summarily deny benefits to significant numbers of claimants who meet the

statutory standard. See *id.* at 156-157 (concurring in rejecting facial challenge to step two of adult process despite concerns that it had been improperly used to deny benefits to claimants meeting the statutory standard, because SSA had responded to criticism with appropriate narrowing guidelines). The issue is not imperfection, but wholesale irrationality, and the uncontradicted showing below is that the challenged policy results in frequent denial of benefits to claimants who can and do meet the statutory standard of "marked and severe" limitations.

III. The Government Fails To Rebut the Strong Showing, Supported by Prominent *Amici*, That the Issue in This Case Is Important and Likely To Evade Review

Finally, the government fails to rebut petitioners' showing that the issue presented in this case warrants review. Judge Katzmann's comprehensive analysis, dismissed as dicta by the second panel, demonstrates that petitioners raise a serious issue of non-compliance with the combination principle underlying decades of court decisions, including *Zebley*. And the *amicus* brief of the Children's Defense Fund and major national mental health organizations reflects the mainstream consensus that SSA's non-combination policy is not just facially illegal but deeply irrational.

The government also appears to concede that the only reason this serious issue has not been litigated in more courts is the scarcity of sophisticated legal assistance for disabled children. See Pet. 22-23. If certiorari is not granted here, the issue may evade review indefinitely, and potentially thousands of poor

children will be deprived of the complete, holistic assessment that Congress intended them to have. This harsh impact is underscored by the Disability Advocates' Brief, which demonstrates the "exceptional importance" of the issue to thousands of families with disabled children. *Id.* at 4. SSI benefits provide crucial support to such families and serve as a gateway for Medicaid and other important benefits. *Id.* at 9-14. Denial of review would frustrate Congress's intent that needy children with "marked and severe" disabilities be provided with aid.

CONCLUSION

For the foregoing reasons, and those previously presented, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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